IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1844

UNION ELECTRIC COMPANY,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

WILLIAM H. FERRELL
314 North Broadway
St. Louis, Missouri 63102
Counsel for Petitioner

STEWART W. SMITH, JR. and
SCHLAFLY, GRIESEDIECK, FERRELL & TOFT
Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Citations

Cases

Constitutional and Statutory Provisions

Report of House Committee

Supreme Court Rules

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. .....

UNION ELECTRIC COMPANY,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioner Union Electric Company respectfully prays that a Writ of Certiorari be issued to review the amended judgment of the United States Court of Appeals for the Eighth Circuit entered in this case as of February 20, 1979. A Petition for Rehearing With Suggestion That the Case Be Reheard by the Court En Banc was denied on March 15, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, which was entered on February 20, 1979, is re-

ported at 593 F(2) 299 (advance sheet of April 30, 1979) and is printed as Appendix A.

JURISDICTION

The amended judgment of the United States Court of Appeals for the Eighth Circuit, which was entered as of February 20, 1979, is printed as Appendix B; and Union Electric Company's Petition for Rehearing With Suggestion That the Case Be Reheard by the Court En Banc was denied by an Order entered March 15, 1979 and printed as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Does the due process clause of the Fifth Amendment to the United States Constitution, as interpreted and applied by this Court in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908) and subsequent decisions, protect a person from incurring the risk of severe and confiscatory civil and criminal penalties for violations of SO_2 provisions in the Missouri implementation plan,[1] while he is legally testing the validity of the application to him of those provisions and when his actual SO_2 emissions present no danger to the public health or welfare?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution says that:

[1] References to such implementation plan are to the plan as approved by the United States Environmental Protection Agency (EPA).

> "No person shall . . . be deprived of life, liberty or property without due process of law . . ."

Section 113(a), (b) and (c) of the Clean Air Act, as amended (42 U.S.C. Section 7413(a), (b) and (c))—the "Act"—sets forth enforcement and penalty provisions and is, therefore, pertinent to this petition. It is printed as Appendix D.

STATEMENT OF THE CASE

In this suit, which was filed in the Federal District Court at St. Louis, Missouri, on February 8, 1978, petitioner Union Electric Company sought a declaratory judgment and a preliminary and permanent injunction prohibiting the EPA from enforcing against the Company and its responsible corporate officers SO_2 emission regulations in the implementation plan during the time the Company was seeking an appropriate revision to that part of the plan.[2] The Company asserted that the requested relief stemmed from the due process clause in the Fifth Amendment to the United States Constitution, as interpreted by this Court in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908) and later decisions. Consequently jurisdiction of the Federal District Court was properly based on the Federal Question Act (28 U.S.C. Sec. 1331) and the Declaratory Judgment Act (28 U.S.C. Sec. 2201).

The Complaint alleges that the implementation plan's SO_2 emission regulation, which applies to the Company's Labadie

[2] Pursuant to Supreme Court Rule 21.1 and by a letter dated May 4, 1979, counsel for petitioner Union Electric Company requested the Clerk of the United States Court of Appeals for the Eighth Circuit to certify and transmit the record in this case to the Supreme Court. Such counsel was advised by a letter dated May 8, 1978 from said Clerk that the Clerk of the Supreme Court had directed him not to forward such Record unless and until so requested by the Supreme Court. In view of the foregoing, this Petition does not include citations to such Record.

and Sioux power plants, is more stringent than necessary to maintain Federal (and Missouri) Ambient Air Quality Standards; and it further alleges that more relaxed emission regulations would permit the maintenance of those standards. In support of such allegations, the Complaint states that the Company and the EPA itself had on several occasions determined that the actual SO_2 emissions from those plants would not prevent the maintenance of such Air Quality Standards[3] and that a relaxation of the SO_2 emission regulations by the Missouri Air Commission would be proper.[4]

As the Complaint alleged, on January 13, 1978, the EPA issued to the Company a Notice of violations of the Clean Air Act, as amended. This Notice which was sent pursuant to Section 113(a)(1) of the Act, listed four Labadie units and two Sioux units as in violation of this unduly stringent SO_2 regulation. The Notice pointed out that if any of these violations continued more than 30 days after such Notice the EPA was required by the Act to commence a civil suit for a permanent or temporary injunction or to assess a civil penalty of not more than $25,000 per day of violation or both. (See Section 113(b) of the Act).[5]

Section 113(c)(1) of the Act also provides criminal penalties for any person who knowingly continues a violation more than 30 days after the EPA Notice. Since there was no question

[3] One of the EPA determinations had been made in response to an Act of Congress—the Energy Supply and Environmental Coordination Act of 1974, which amended Section 110(a)(3)(B) of the Clean Air Act.

[4] At the hearing on the preliminary injunction, the Company presented evidence in support of these allegations, as well as evidence in support of the other allegations of the Complaint.

[5] While this "requirement of a civil suit extends only to a "major stationary source" everyone agrees that Labadie and Sioux are major stationary sources (See Appendix A, p. A-9).

but that Union Electric officers knew the Company's Labadie and Sioux plants violated the emission regulation, the Company and its responsible corporate officers[6] would be subject to such criminal penalties, if any violation so continued.

The criminal penalties for the first offense are a fine of up to $25,000 per day of violation or imprisonment for up to one year or both. After the first conviction the fine goes to $50,000 and imprisonment to two years.[7]

On February 3, 1978, the EPA indicated in a conference with Union Electric personnel that it would commence civil enforcement proceedings without awaiting the result of legal proceedings, which the Company was then, and for over a year had been, pursuing for the purpose of obtaining an appropriate revision of the implementation plan.[8]

The Company alleged in its Complaint that it was physically impossible to discontinue such violations within the 30 day period or a considerable time thereafter without shutting down the Labadie and Sioux plants.[9] The shutting down of those plants would result in dropping over 50% of the Company's base electrical load and would be an enormous hardship to the people of the St. Louis Metropolitan Area. Additionally, it would constitute a grave danger to the entire Mid-west.

[6] Section 113(c)(3) of the Act says that the term "person" insofar as criminal penalties are concerned, includes any "responsible corporate officer." As stated in the Complaint, no Union Electric officers were joined, since no one knew the scope of the phrase "responsible corporate officer". However, an offer was there made to join the Company's officers as party plaintiffs.

[7] Section 113(c)(1) of the Act.

[8] See Appendix A, p. A-9.

[9] While the Court of Appeals opinion (Appendix A, p. A-10) generally covers these allegations, it failed to mention the allegation that FGD equipment is not a shelf item and that its installation requires about five years.

Since the only choice the Company and its responsible officers had was to bring about this catastrophe or run the risk of the severe civil and criminal penalties we have mentioned, the Company sought a declaratory judgment and injunction prohibiting EPA enforcement while it was pursuing (through administrative and, if need be judicial, proceedings) an appropriate revision to the implementation plan. And as we mentioned earlier, no question of public health was involved since the Air Standards were then being, and would continue to be, maintained regardless of the fact that the Company's Labadie and Sioux plants were not meeting the implementation plan regulation.

The Company alleged irreparable injury and inadequacy of legal remedies and it sought and obtained a preliminary injunction, limited, however, to State proceedings. But that preliminary injunction no longer constitutes the only aspect of this case, because in addition to reversing such injunction the opinion of the 8th Circuit directed (Appendix A, p. A-3) and its amended judgment ordered (Appendix B) the dismissal of the entire Complaint. No doubt that dismissal was occasioned by the fact that the 8th Circuit did not consider the Complaint as affording any basis for relief. Our petition for certiorari seeks review of this amended judgment of the 8th Circuit.

REASONS FOR GRANTING THE WRIT

We respectfully submit that the requested writ should be granted because the Court of Appeals decided the federal question presented to it in a way in conflict with applicable decisions of this Court.[10] The pertinent federal question is whether the due process clause in the Fifth Amendment to the United States Constitution protects a person from incurring the risk of severe and confiscatory civil and criminal penalties as a condition to legally testing the validity of the application to him of federal administrative regulations. And as we previously pointed out, the Ambient Air Standards are being and will continue to be maintained. Thus no one could rightly claim that the public health or welfare would be endangered during the testing period.

We submit that the decision of this Court in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908) and its later decisions approving the principle there established[11] squarely hold that a person is constitutionally so protected. The decision of the Court of Appeals in the instant case is in conflict with the *Young* decision and abrogates the principle there established. We respectfully submit that if a constitutional principle, which has been established by this Court, is to be abrogated or modified it should be done by this Court, not by a Court of Appeals. Therefore we urge that the requested writ be granted.

Before returning to the precise point in this case, we believe that an essential, though perhaps somewhat corollary, point should be mentioned.[12] We do not believe that any United

---

[10] See Supreme Court Rule 19.1(b).

[11] See, for instance *Wadley Southern Railway Company v. Georgia*, 235 U.S. 651, 35 S.Ct. 214, 218 (1915) and *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 40 Sup.Ct. 338, 340 (1920).

[12] The Court of Appeals felt the same way, since this "corollary" point was covered in its opinion (Appendix A, pp. A-16-17).

States Court or citizen would question the proposition that it would be unconstitutional to apply a Federal Administrative regulation to a person, which would confiscate his property and place him in prison, when such application was not in furtherance of the public health or welfare. And the quest by the Court of Appeals for a forum in which petitioner could present and be heard on the constitutionality of such an application constitutes a concession of this principle (See Appendix A, pp. A-16 and 17)

While the Court of Appeals said that the proper forum was the Federal District Court (where we already were), it further said that the only federal proceeding in which such a constitutional right could be raised, heard and considered was an enforcement proceeding brought by the EPA.[13] Its conclusion to that effect was not based upon any decision of this Court. To the contrary this Court stated at the end of footnote 18 of its decision in *Union Electric Company v. EPA*, 427 U.S. 246, 268, 96 Sup.Ct. 2518, 2531 (1976) that it was not addressing this question.

The Court of Appeals conclusion as to the forum and the nature of the proceeding for raising the constitutional question was based on its previous decision in *Lloyd A. Fry Roofing Co. v. United States EPA* (8th CCA 1977), 554 F(2) 885, 891.[14] And it further attempted to buttress that conclusion by a post-argument letter from the Department of Justice Attorney

[13] The Court's intimation (Appendix A, pp. 11 and 16) that a state court would be a proper forum can hardly be taken seriously. We do not believe that a state court has jurisdiction to enjoin a Federal Agency from taking enforcement action under a Federal Statute in a Federal Court. (See Section 113(b) of the Act.)

[14] The *Fry* case was not commenced in the District Court until after the enforcement proceeding was underway and an EPA abatement order had been issued. Thus, it could be said that Fry had passed up his opportunity to obtain the relief we are here seeking. Additionally the 8th Circuit did not mention in its *Fry* opinion the constitutional principle on which we rely.

representing the EPA (Appendix A, p. A-17). Assuming the propriety and strength of such authority, we read that letter as stating that in the opinion of the Assistant Attorney General who wrote the letter questions of constitutionality and validity *cannot* be raised in an enforcement proceeding (Appendix A, p. A-17).[15]

On this general point we mention finally the contention gingerly but oft advanced that raising a constitutional point in a Court (even though the Court is not permitted to hear or consider it) satisfies constitutional requirements. Of course, this contention is a patent denial of constitutional rights.

Turning directly to the precise point of this case, the Court of Appeals seems to place some reliance for its holding on a letter dated September 13, 1978, from the "Director, Enforcement Division, EPA Region VII" to Petitioner.[16] We respectfully submit that this letter is untenable from the standpoints of purpose, scope and legality.[17] As a matter of fact, the 8th Circuit itself expressed some question about its "legality" (Appendix A, p A-16, footnote 8).

As we stated at the outset of this part of our petition, the specific federal question is whether the Federal Constitution

[15] Such an opinion would accord with the opinion stated on page 68 of the Report of the House Committee on Interstate and Foreign Commerce concerning the Clean Air Act Amendments of 1977 (H.R. Report 95-294, 95th Congress, 1st Session, dated May 27, 1977). This report was also submitted to the 8th Circuit in a post-argument letter but was not mentioned in its opinion.

[16] See Appendix A, p. A-16 and its footnote 8. This letter, which, among a number of other things, purports to grant a "limited administrative reprieve", got into the case through the procedure of the Assistant Attorney General attaching a copy of it to his Reply Brief in the 8th Circuit.

[17] Certainly a letter from personnel in an EPA regional office could hardly be thought a defense to a citizen's suit brought under Section 304(a)(2) of the Act to compel the EPA Administrator to enforce emission standards in the implementation plan.

protects a person from the risk of severe and confiscatory penalties while legally testing the validity of the application to him of Federal Administrative Regulations although during the testing process there is no danger to the public health or welfare.

The decision in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908), which we consider in point, is discussed and quoted in the Court of Appeals opinion (Appendix A, pp. A-3 and 15). Consequently we do not repeat it here. The principle there established was subsequently explained in the decision of *Wadley Southern R. Co. v. Georgia*, 235 U.S. 651, 35 S.Ct. 214, 218 (1915) as follows:

> "These cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to *administrative orders*, but they are all based upon the fundamental proposition that under the Constitution penalties cannot be collected if they operate to deter an interested party from testing the validity of legislative rates or orders legislative in their nature. Their legality is not apparent on the face of such orders, but depends upon a showing of extrinsic facts. A statute, therefore, which imposes heavy penalties for violation of commands of an unascertained quality is, in its nature, somewhat akin to an ex post facto law, since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position *where he himself must, at his own risk, pass upon the question*. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than *risk* the enormous cumulative or confiscatory punishment that *might* be imposed if they should thereafter be declared to be valid." (emphasis added).

The foregoing quotation is inserted because it clearly demonstrates (1) that this principle applies to administrative action (with which we are here confronted) as well as to legislative enactments, and (2) that the constitutional protection is against the *risk* of incurring severe penalties, not against the necessity or certainty that they will in fact be incurred.

The Court of Appeals distinguishes the *Young* decision on the ground that Union Electric will be able to test this part of the implementation plan in an enforcement proceeding "without *necessarily* incurring confiscatory fines and penalties" (Appendix A, p. A-15).[18] The decision of the 2nd Circuit in *Brown & Williamson Tobacco Corp. v. Engman*, 527 F(2) 1115 (1975), *cert. denied*, 426 U.S. 911, 96 S.Ct. 2237 is the only authority the 8th Circuit cites in support of its statement.

Following the above quoted statement in the 8th Circuit opinion, the Court says that the EPA Administrator has the alternative of either seeking injunctive relief or imposing civil or criminal penalties. We do not know whether the Court is implying that injunctive relief does not come under the category of "severe and confiscatory penalties". But if that is its intent, we respectfully submit that there are few things more confiscatory than compelling a person to shut down his plant because he is physically unable to comply with an unsupportable regulation.[19]

---

[18] In the event a point were to be made about it, everyone agrees that there was no real opportunity for a testing during the formulation or EPA approval of the initial implementation plan (See Section 110(a)(1) and (2) of the Act. 42 U.S.C. Section 7410(a)(1) and (2)). Additionally circumstances have changed materially since this 1972 approval.

[19] On the question of confiscation, see this Court's discussion of the Company's dilemma in that part of the *Young* opinion which is quoted by the 8th Circuit at p. A-14 of Appendix A.

However, this is not the real point of our case. The constitutional protection is against the *risk* of incurring severe and confiscatory fines and penalties, not the certainty or necessity that they will in fact be assessed. Of course we all know that for one reason or another this result may never happen, and this Court so indicated in its *Young* and *Wadley* opinions.

Before moving on, we believe it proper to finish that part of the *Brown & Williamson* opinion from which the 8th Circuit obtained the phrase "without *necessarily* incurring confiscatory fines and penalties." The immediately following sentence says

> "The Constitutional requirement is satisfied by a statutory scheme which provides an opportunity for testing the validity of the statutes or administrative orders without incurring the *prospect* of debilitating or confiscatory penalties." (emphasis added—527 F(2) at p. 1119.)

We submit that this is an accurate statement of the constitutional requirement and that such requirement was not met in the instant case.

As the 8th Circuit Court of Appeals pointed out (Appendix A, pp. A-11 and 12), Section 113(b) of the Act says that

> "In determining the amount of any civil penalty to be assessed under this subsection, the courts shall take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation."

This possibility of judicial grace does not apply to suits for injunctive relief or criminal penalties. Certainly such a limited, statutory possibility of judicial grace, or even an inherent judicial grace, does not dispense with constitutional requirements. American Jurisprudence has taught us that the Due Process

clause in the Fifth Amendment applies to all three branches of our Federal Government.[20]

In conclusion we refer briefly to a part of the earlier opinion of this Court in *Union Electric Company v. EPA*, 427 U.S. 246, 266-7, 96 Sup.Ct. 2518, 2529-2530 (1976). The Court there said:

> ". . . we do not hold that claims of infeasibility are never of relevance in the formulation of an implementation plan or that sources unable to comply with emission limitations must inevitably be shut down.
>
> "Perhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan. So long as the national standards are met, the State may select whatever mix of control devices it desires, . . . and industries with particular economic or technical problems may seek special treatment in the plan itself. . . . Moreover, if the industry is not exempted from, or accommodated by, the original plan, it may obtain a variance, as petitioner did in this case; and the variance, if granted after notice and a hearing, may be submitted to the EPA as a revision of the plan. . . . Lastly, an industry denied an exemption from the implementation plan, or denied a subsequent variance, may be able to take its claims of economic or technological infeasibility to the the state courts. . . ."

As Union Electric's complaint alleges, shortly after this suggestion from the Supreme Court the Company followed it by filing a petition with the Missouri Air Conservation Commission seeking an appropriate change in the existing SO_2 regulations. In doing so and in pursuing such request, neither the Company nor its responsible corporate officers believed they

---

[20] See *Hovey v. Elliot*, 167 U.S. 409, 17 S. Ct. 841, 844-5 (1897).

were incurring the risk of severe and confiscatory penalties, and perhaps even being met with the prospect of continuing their quest after fines had been imposed and collected and while responsible corporate officers were serving penitentiary sentences. We are confident that if any member of this Court had thought that such a risk existed he would have mentioned it. But none did.

CONCLUSION

For the reasons set forth above, we respectfully pray that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

WILLIAM H. FERRELL
314 North Broadway
St. Louis, Missouri 63102
Counsel for Petitioner

STEWART W. SMITH, JR.

and

SCHLAFLY, GRIESEDIECK, FERRELL
& TOFT

Of Counsel

APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the Eighth Circuit, Entered on February 20, 1978 and Reported at 593 F.2d 299 (Advance Sheet of April 30, 1979)

UNION ELECTRIC COMPANY,
Appellee,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Appellant.

No. 78-1357.

United States Court of Appeals,
Eighth Circuit.

Submitted Nov. 16, 1978.

Decided Feb. 20, 1979.

Rehearing and Rehearing En Banc

Denied March 15, 1979.

Environmental Protection Agency appealed from a judgment of the United States District Court for the Eastern District of Missouri, Roy W. Harper, Senior District Judge, 450 F.Supp. 805, which enjoined it from instituting an enforcement proceeding under the Clean Air Act against an electric utility. The Court of Appeals, Heaney, Circuit Judge, held that Environmental Protection Agency was not subject to injunction prohibiting it from instituting enforcement proceeding under Clean Air Act against electric company or its officers even though the company was actively and in good faith pursuing a revision or variance of sulfur dioxide regulations of the Missouri Implementation

Plan in administrative agencies and/or courts of State of Missouri.

Reversed.

1. Health and Environment Key 28

Question of whether noncomplying polluter may continue operations without change if such change is not technologically or economically feasible may be raised in enforcement proceeding instituted by Environmental Protection Agency under Clean Air Act. Clean Air Act Amendments of 1977, § 101 et seq., 42 U.S.C.A. § 7401 et seq.

2. Health and Environment Key 28

Environmental Protection Agency was not subject to injunction prohibiting it from instituting enforcement proceeding under Clean Air Act against electric company or its officers even though company was actively and in good faith pursuing revision or variance of sulfur dioxide regulations of Missouri Implementation Plan in administrative agencies and/or courts of State of Missouri. Clean Air Act Amendments of 1977, § 101 et seq., 42 U.S.C.A. § 7401 et seq.

William H. Ferrell of Schlafly, Griesedieck, Ferrell & Toft, St. Louis, Mo., for appellee; James J. Virtel, Jerry B. Wamser, St. Louis, Mo., on the brief.

Martin Green, Atty., Dept. of Justice, Washington, D. C., for appellant; Sanford Sagalkin, Deputy Asst. Atty. Gen., Washington, D. C., Robert D. Kingsland, U. S. Atty., Joseph B. Moore, Asst. U. S. Atty., St. Louis, Mo., George R. Hyde, Barbara Brandon, Attys. Dept. of Justice, Washington, D. C., on the brief; Joan Z. Bernstein, Gen. Counsel, Ronald C. Hausmann,

Atty., Environmental Protection Agency, Washington, D. C., of counsel.

Before LAY and HEANEY, Circuit Judges, and HANSON,* Senior District Judge.

HEANEY, Circuit Judge.

The Environmental Protection Agency appeals from a judgment of the United States District Court for the Eastern District of Missouri which enjoined the EPA from instituting an enforcement proceeding under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, against the Union Electric Company or its officers while that Company is actively and in good faith pursuing a revision or variance of the sulfur dioxide (SO_2 regulations of the Missouri Implementation Plan in the administrative agencies and/or courts of the State of Missouri. We reverse the judgment of the District Court and direct that the complaint of Union Electric be dismissed.

Union Electric serves the metropolitan St. Louis area and parts of Illinois and Iowa. Its three coal-fired generating plants, Labadie, Meramec and Sioux, are subject to the SO_2 and opacity restrictions in the Missouri Implementation Plan as approved by the EPA on May 31, 1972.

Union Electric did not seek review of the approved Missouri Implementation Plan within thirty days as it was entitled to do under § 307(b)(1) of the Act, 42 U.S.C. § 1857h-5(b)(1).[1]

---

* WILLIAM C. HANSON, United States Senior District Judge for the Southern District of Iowa, sitting by designation.

[1] Section 307(b)(1) was revised by the Clean Air Act Amendments of 1977, Pub.L. No. 95-95, 91 Stat. 685 (1977), and the new version of this section now appears at 42 U.S.C. § 7607. We note that in *Union Electric Co. v. EPA*, 427 U.S. 246, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976), the Supreme Court held that questions of economic or technological infeasibility cannot be raised in proceedings under this section. *Id.* at 265-266, 96 S.Ct. 2518.

It did, however, obtain one-year variances from the appropriate state and county agencies which eased the emission limitations affecting its three plants. The variances for two of the three plants had expired and Union Electric was applying for extensions when, on May 31, 1974, the Administrator of the EPA notified the Company that the SO_2 emissions from its plants violated the emission limitations contained in the Missouri Implementation Plan, and advised it of the probability that enforcement proceedings would soon be instituted.

On August 18, 1974, Union Electric sought review in this Court, contending that the SO_2 emission regulations contained in the Missouri Implementation Plan were economically and technologically infeasible and that its emissions were not interfering with attainment or maintenance of the National Ambient Air Quality Standards (NAAQS). We held that the claims of infeasibility did not afford a basis for review under § 307(b)(1) of the Act, 42 U.S.C. § 1857h-5(b)(1), and dismissed Union Electric's petition for lack of jurisdiction. *Union Electric Co. v. Environmental Pro. Agcy.*, 515 F.2d 206 (8th Cir. 1975).

Our decision was affirmed by the Supreme Court on October 6, 1975. *Union Electric Co. v. EPA*, 427 U.S. 246, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976). In that opinion, the Supreme Court stated:

> [C]laims of economic or technological infeasibility may not be considered by the Administrator in evaluating a state requirement that primary ambient air quality standards be met in the mandatory three years. * * * [T]he States may submit implementation plans more stringent than federal law requires and * * *the Administrator must approve such plans if they meet the minimum requirements of § 110(a)(2), * * * [thus] the language of § 110(a)(2)(B) provides no basis for the Administrator ever to reject a state implementation plan on the ground that it is economically

> or technologically infeasible. Accordingly, a court of appeals reviewing an approved plan under § 307(b)(1) cannot set it aside on those grounds, no matter when they are raised.
>
> Our conclusion is bolstered by recognition that the Amendments do allow claims of technological and economic infeasibility to be raised in situations where consideration of such claims will not substantially interfere with the primary congressional purpose of prompt attainment of the national air quality standards. Thus, we do not hold that claims of infeasibility are never of relevance in the formulation of an implementation plan or that sources unable to comply with emission limitations must inevitably be shut down.
>
> Perhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan. So long as the national standards are met, the State may select whatever mix of control devices it desires, * * * and industries with particular economic or technological problems may seek special treatment in the plan itself. * * * Moreover, if the industry is not exempted from, or accommodated by, the original plan, it may obtain a variance, as petitioner did in this case; and the variance, if granted after notice and a hearing, may be submitted to the EPA as a revision of the plan. § 110(a)(3)(A), as amended, 88 Stat. 256, 42 U.S.C. § 1857c-5(a)(3)(A) (1970 ed., Supp. IV.) Lastly, an industry denied an exemption from the implementation plan, or denied a subsequent variance, may be able to take its claims of economic or technological infeasibility to the state courts. See, e. g., § 203.130, Mo[.] Rev[.] Stat[.] (1972); Cal[.] Health & Safety Code § 39506 (1973); Pa[.] Stat[.] Ann[.] Tit. 71, § 1710.41 (1962). (Citations and footnotes omitted, and emphasis added.)

Id. at 265-267, 96 S.Ct. at 2529-30.

Union Electric petitioned the Supreme Court for a rehearing, which was subsequently denied. The Regional Administrator for EPA wrote a letter to the chairman of the Missouri Air Quality Commission, which stated in part:

> The EPA has reviewed the SO_2 monitoring data for the area around three UECO plants and performed some diffusion modeling calculations. The results of this review and these calculations indicates [sic] that UECO was correct in the contention that its SO_2 emissions were not interfering with the attainment or maintenance of the NAAQS for SO_2.
>
> * * * * * * *
>
> The EPA has no objections to your amending Regulation X to relax the SO_2 emission standard for the three UECO plants which were mentioned previously. The new SO_2 emission standard must still provide for attainment and maintenance of the NAAQS and this must be demonstrated by a revision to the Control Strategy Section of the Missouri State Implementation Pan.
>
> If you decide not to follow the above course of action or place the UECO on a compliance schedule to comply with Regulation X, the EPA has no alternative but to issue an Administrative Order, pursuant to Section 113 of the Clean Air Act, which requires the UECO to comply with the SO_2 emission standard specified by Regulation X. This enforcement action is necessary because the EPA cannot allow an emission source to violate an emission standard in a federally approved SIP [State Implementation Plan] unless there is an approved expeditious compliance schedule.
>
> Because of the seriousness and magnitude of this problem, it is imperative for the Missouri Air Conservation Commission (MACC) and the EPA to be on the same wave length. I will be looking forward to hearing from you on any decisions the MACC may make. If we can help, let me know.

In September, 1976, Union Electric filed a petition with the Missouri Air Conservation Commission for a relaxation of the existing regulations for SO_2, or, in the alternative, for a variance from existing regulations for the Company's plants. In April, 1977, the Commission tabled the Company's request to change the existing SO_2 emission limitations and denied the Company's request for a variance for its St. Louis plant. The Commission indicated, however, that it would consider the Company's petition for variances for the Sioux and Labadie plants. A representative of the EPA was present and indicated agreement with that procedure.[2] Variance petitions for the Sioux and Labadie plants were filed by the Company in September, 1977.

On November 11, 1977, the Regional Administrator of the EPA wrote a letter to the Director of the Missouri Division of Environmental Quality which stated, in pertinent part:

> Based on inspections conducted by the Environmental Protection Agency in the Fall of 1976, the Portage Des Sioux and Labadie power plants are both in violation of the SO_2 emission limitation in the approved Missouri Implementation Plan. As you know, Union Electric petitioned the Missouri Air Conservation Commission in the Fall of 1976 for a relaxation of the existing regulation for SO_2 or, in the alternative, for a variance from the existing regulation for the individual Union Electric plants. The Commission voted not to change the SO_2 emission limitations for the St. Louis metropolitan area, but indicated they would

---

[2] A variance shall be considered as a revision of the State Implementation Plan and approved as such by the EPA if, in addition to meeting procedural requirements, it will not prevent the maintenance of National Air Quality Standards. *Train v. Natural Resources Def. Council*, 421 U.S. 60, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975).

consider the company's petition for a variance for the Sioux and Labadie plants.

In a letter to you dated May 31, 1977, Mr. Charles V. Wright, Acting Regional Administrator, stated that since the Commission had voted not to change the SO_2 emission limitation in the St. Louis regulation, the State was expected to act promptly to either bring the Union Electric plants into compliance with the existing limitation or to adopt and justify less stringent limitations in accordance with Federal requirements. Five months have passed and the State has yet to take any action with regard to the Labadie and Sioux power plants.

* * * * * * *

I have asked my staff to inspect the Union Electric Meremac [sic], Sioux, and Labadie plants within the next forty-five (45) days to verify and formally document their current status of compliance with all applicable emission limitations in the State plan. If these sources are found to be in violation, this office will be required to take appropriate action under Sections 113(a)(1) and 113(b) of the Act in the absence of any formal action by the Commission on the Union Electric variance petitions.

On January 13, 1978, the EPA notified Union Electric of its alleged violations of the SO_2 and opacity standards of the Missouri Implementation Plan. The EPA stated that Union Electric's Labadie and Sioux power plants were in violation of SO_2 and opacity regulations, and that the Meramec plant was in violation of opacity regulations.[3] The notice invited Union Electric to a conference to discuss the violations, and set forth the

[3] Prior to this date, the Meramec plant started using low sulfur coal which resulted in that plant being in compliance with the SO_2 emission limitation.

statutory responsibilities of the Agency if the matter was not resolved within thirty days.[4]

On February 3, 1978, the EPA held the conference with Union Electric. At this conference, the EPA indicated that it would commence enforcement proceedings without waiting for the decision of the Missouri Commission on the Company's request for variances for its plants. The EPA indicated that it was required to proceed with enforcement by § 111(b) of the Clean Air Act Amendments of 1977, 42 U.S.C. § 7413(b)(2)(B).

On February 8, 1978, Union Electric brought this action in federal District Court for the Eastern District of Missouri, seeking a declaratory judgment and temporary and permanent injunctive relief. It simultaneously sought action by the State of Missouri on its variance requests.

[4] This notice stated, in relevant part:

> Section 113(b) of the Clean Air Act, as extensively revised by the recent 1977 Clean Air Act Amendments, now provides that whenever any person violates a requirement of an applicable implementation plan more than 30 days after having been notified of the violation, the Administrator shall, in the case of a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both. A major stationary source is defined as any source which directly emits or has the potential to emit, one hundred tons per year or more of any air pollutant. The Administrator may also issue an order to require immediate compliance under Section 113(a) or an order specifying a delayed compliance date in accordance with specific requirements of Section 113(d) of the criminal penalties in certain cases.
>
> In accordance with Section 113(a)(4) of the Act, we are offering you an opportunity for a conference to discuss the violations which are the subject of this Notice. The conference will afford Union Electric an opportunity to present information upon the findings of violation, on the nature of the violations, on any prior efforts made to achieve compliance or on steps the company has taken or will take to comply with the applicable regulations.

On March 16, 1978, the District Court granted the preliminary injunction requested by Union Electric 450 F.Supp. 805. The court found: (1) that Union Electric was in the unenviable position of having daily penalties for noncompliance with the Missouri Implementation Plan accrue while it sought variances pursuant to the statutorily authorized procedure contained in Mo.Ann.Stat. § 203.110 (Vernon); (2) that the failure of Union Electric to comply with any governmental directive could constitute an act of default under its first mortgage and deed of trust and make its bonds callable, and that a calling of the bonds could force it into brankruptcy; (3) that compliance with the SO_2 regulations is not possible because compliance can be achieved only by installing flue gas desulfurization (FGD) equipment at an initial cost of $713 million and annual operating costs of $137 million, that the FGD equipment could not be relied upon to operate continually or satisfactorily, that the use of low sulfur coal as an alternative was not possible because the annual cost of such coal would be $179 million per year and would require a capital investment of $49 million, resulting in a rate increase of twenty-five percent, assuming that there was no reduction in the use of electricity, and that, in any event, it was impossible to obtain a sufficient supply of low sulfur coal to meet the SO_2 emission regulations; (4) that compliance with SO_2 regulations could be achieved only by a shutdown of the Union Electric plants which would result in a widespread electrical breakdown throughout the Midwest and drastic financial consequences to Union Electric; (5) that the injury to the EPA was not substantial because Union Electric's plants did not violate the National Air Quality Standards for SO_2; and (6) that Union Electric had a substantial likelihood of success on the merits because the Missouri Air Conservation Commission had informally indicated it would approve the variance.

The court concluded that: (1) considerations of procedural due process required that Union Electric be permitted to seek

a variance under state procedures for SO_2 emissions[5] prior to suffering a grievous loss which may result from an enforcement proceeding by the EPA; (2) that it had the general equitable power to stay an enforcement proceeding to prevent irreparable harm while Union Electric seeks the variances, in good faith, under state procedures; and (3) that the only fair interpretation of the Clean Air Act is to allow the variance proceeding to proceed to completion prior to the initiation of an enforcement action. This appeal was filed on May 15, 1978.

On July 26, 1978, more than two months after this appeal was filed, the Missouri Air Conservation Commission granted the variance in the SO_2 standards requested by Union Electric for its Sioux and Labadie plants. A petition to review that variance was subsequently filed in the Circuit Court of Cole County, Missouri, by the Coalition for the Environment and by the State of Illinois. That action is still pending.

In *Lloyd A. Fry Roofing Co. v. United States E.P.A.*, 554 F.2d 885 (8th Cir. 1977), we held that pre-enforcement judicial review of an abatement order on grounds of technological or economic infeasibility is inconsistent with the enforcement mechanism established by Congress in the Clean Air Act. Senior Judge M. C. Matthes, writing for the Court, pointed out that a company seeking to have these issues reviewed could do so in state court, or could present its cause as a defense to any enforcement proceedings initiated by the EPA in federal district court. He also noted that if the Agency seeks retroactive civil penalties, a company can protect itself by invoking the equitable doctrine of laches if the Agency failed to promptly seek enforcement.[6] *Id.* at 891 & n.4.

---

[5] Union Electric concedes that the District Court did not enjoin the EPA from enforcing opacity regulations.

[6] Civil or criminal penalties are not required by the Act. The Administrator may seek injunctive relief instead. 42 U.S.C. § 7413(b). If the Administrator seeks a civil penalty, the court is required to

Union Electric would have us distinguish *Fry* on the grounds that the plaintiff in *Fry* sought pre-enforcement review of an EPA compliance order while, here, it seeks only a temporary stay of any enforcement action which may be undertaken by the EPA pursuant to the notice of violation while a state variance from the emission limitations is sought.

Certainly this case cannot be distinguished from *Fry* on the grounds that *Fry* involved a compliance order and this case involves a notice of violation. If an abatement order may not be the subject of an anticipatory lawsuit enjoining its enforcement, then surely a notice of violation, which is a procedural prerequisite to an abatement order, may not be the subject of such a suit.[7]

Nor can it be distinguished from *Fry* on the grounds that *Fry* involved an attempt to obtain a pre-enforcement decision in Federal court on the merits of the Missouri Implementation Plan, while here, the attempt is only to secure a temporary stay of any further enforcement procedures while the Company is actively and in good faith pursuing a revision of the SO_2 emission regulations in state administrative agencies or courts. This distinction, of course, exists. However, it is not one which permits us to reach a result different than that which was reached in *Fry*. Section 7413(b) specifically requires the Administrator to commence a civil action for injunctive relief or for the

---

take into consideration "(in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." *Id.*

[7] If a violation of the Act continues unabated for more than thirty days after issuance of a notice of violation, the Agency may either (1) immediately commence a civil action for injunctive or other relief; or (2) issue a compliance order, which is not effective until after an informal administrative conference. Under the second alternative, if the order issued by the Agency is not met within the specific time or informal efforts to abate prove unsatisfactory, the Agency is authorized to initiate an action in district court to compel compliance. 42 U.S.C. § 7413(a),(b).

assessment of civil or criminal penalties thirty days after notice of violation has been given to a major stationary source. One purpose of this section is to require the states to act promptly in granting or denying variance requests. This purpose would be thwarted if federal courts were permitted to remove the pressures that Congress clearly thought necessary to accomplish the objectives of the Clean Air Act. The heart of the decision in *Fry* is that federal courts should not interfere with the pre-enforcement procedures established by the Act to obtain compliance. *Fry* recognized that Congress intended the 1970 Amendments to the Clean Air Act to "expedite the implementation and enforcement of air quality standards" and that the Amendments were " 'a drastic remedy to what was perceived as a serious and otherwise uncheckable problem.' " *Id.* at 889, 891.

No case could better illustrate the need for expeditious enforcement than this one. The Missouri Implementation Plan was approved on May 31, 1972. Now, nearly seven years later, Union Electric is still not in compliance with the plan's SO_2 emissions limitations at its Labadie or Sioux plants, and the State of Missouri has yet to finally approve or disapprove its request for a variance from existing standards.

This statement of fact is not necessarily intended to point the finger at Union Electric, the State of Missouri or the EPA. All have been responsible in one way or another for the delays that have occurred. It is only to emphasize that we can only be faithful to the mandate of Congress if we require strict adherence to the procedural routes which it established for bringing clean air to the nation.

In *Fry*, we did not consider a contention by Union Electric which was deemed important by the District Court, *i. e.*, that Union Electric has a due process right to contest the validity of the emission standard without necessarily having to face

ruinous penalties if it loses its action. The District Court relied on *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L. Ed. 714 (1908), in so holding. In *Young*, the State of Minnesota enacted a number of statutes which established minimum rates which could be charged by railroads within the State and which fixed penalties for the railroads' failure to comply. Railroad officials contended that the statutes were invalid because the penalties imposed were so severe that no company official would run the risk of violating the statutes in order to test their validity. The Supreme Court sustained their contention. It stated:

> Another Federal question is the alleged unconstitutionality of these acts because of the enormous penalties denounced for their violation, which prevent the railway company, as alleged, or any of its servants or employees, from resorting to the courts for the purpose of determining the validity of such acts. The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of the unconstitutionality of the acts and orders in question; at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that rather than take such risks the company would obey the laws, although such obedience might also result in the end (though by a slower process) in such confiscation.
>
> . . . . .
>
> [W]hen the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

> Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event.

Id. at 144-145, 148, 28 S.Ct. at 447-449. *See also St. Regis Paper Co. v. United States*, 363 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961); *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596 (1920); *Wadley S. R. Co. v. Georgia*, 235 U.S. 651, 35 S.Ct. 214, 59 L.Ed. 405 (1915).

We do not believe *Young* to be applicable here. Union Electric has an opportunity to test the validity of the Missouri Implementation Plan without *necessarily* incurring confiscatory fines and penalties. *See Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115 (2d Cir. 1975), *cert. denied*, 426 U.S. 911, 96 S.Ct. 2237, 48 L.Ed.2d 837 (1976). The Administrator of the EPA, as we pointed out in note 6, *supra*, has two alternatives. He can either seek injunctive relief or can seek to impose civil or criminal penalties. We should not anticipate what the Administrator will seek in advance of his decision. Thus, it cannot be said that confiscatory fines and penalties will *necessarily* be incurred. Indeed, the Administrator apparently feels, in this case, that he has a third alternative—that of staying

enforcement until the resolution of Union Electric's variance request.[8]

Union Electric makes a corollary argument that it must, at some point, have a forum in which to raise its contention that compliance with the Missouri Implementation Plan is economically and technologically infeasible, and that denial of such a forum results in its property being taken without due process of law. Without ruling on the merits of this issue, the Supreme Court stated in *Union Electric Co. v. EPA, supra,* that such a forum is available to alleged violators because contentions of economic and technological infeasibility can be raised in state court. *Union Electric Co. v. EPA, supra,* 427 U.S. at 266-267, 96 S.Ct. 2518. *See also West Penn Power Company v. Train,* 522 F.2d 302, 311-313 (3d Cir. 1975), *cert. denied,* 426 U.S. 947, 96 S.Ct. 3165, 49 L.Ed.2d 1183 (1976). Moreover, this Court held in *Fry* that such issues can be raised as a defense in an enforcement proceeding.[9] *Lloyd A. Fry Roofing Co. v. United States E.P.A., supra* at 891. The EPA conceded at oral argument that these issues can be raised in an enforcement proceeding. It affirmed that position in a post-argument memorandum which states:

---

[8] On September 13, 1978, the EPA notified Union Electric that it will not initiate any enforcement proceedings against that Company with respect to its alleged violations of the existing SO_2 emission limitations until the Regional Administrator of the EPA has informed Union Electric, in writing, of its decision regarding a recommended approval or disapproval of the variance. The Company was further notified that if EPA's Regional Office recommended approval, the enforcement stay would be extended until such time as the Administrator of EPA has taken final action on the variance request. This notification would also appear to eliminate any risk that the Company's bonds would be called for failure to follow a governmental directive. We express no opinion as to whether this stay is authorized by the Act.

[9] In *Union Electric Co. v. EPA, supra,* 427 U.S. at 268 n. 18, 96 S.Ct. 2518, the Supreme Court declined to decide whether questions of economic and technological infeasibility can be raised in an enforcement proceeding.

> Our position remains that, as was stated in *Union Electric v. Environmental Protection Agency,* 427 U.S. 246, 268 [96 S.Ct. 2518, 49 L.Ed.2d 474] (1976), "claims of technological or economic infeasibility * * * are relevant to fashioning an appropriate compliance order under § 113 (a)(4)". And, of course, when a compliance order becomes the subject of an enforcement proceeding, then those same claims may be considered by the courts. Concededly, the Supreme Court, in footnote 18 of the *Union Electric* decision, *supra* at page 268 [96 S.Ct. 2518], expressly declined to address the question whether economic or technological infeasibility may be raised as a defense in civil or criminal enforcement proceedings. In our opinion, however, the correct rule must be that while such matters may not be raised in defense when the purpose of the defense is to contest the validity or constitutionality of an order, they may be raised as matters to be considered where the object of the proceeding is to fashion a schedule and plan which a company can comply with.

[1,2] We cannot, of course, read more into *Fry* or into the EPA's concession than was intended. We do not now hold that the Clean Air Act will ultimately permit a non-complying polluter to continue operations without change if such change is not technologically or economically feasible. We do hold, however, that this question can be raised in any future enforcement proceeding, and that Union Electric at that time will be able to argue that Congress did not intend that result or that, if it was intended, the statute is unconstitutional.[10] We reserve our decision on that issue until it is properly presented to us.

---

[10] Mr. Justice Powell, concurring in *Union Electric Co. v. EPA, supra* at 271-272, 96 S.Ct. at 2532, stated:

> Environmental concerns, long neglected, merit high priority, and Congress properly has made protection of the public health its paramount consideration. * * * But the shutdown of an urban area's electrical service could have an even more serious impact on the health of the public than that created by a decline in

We reaffirm our decision in *Lloyd A. Fry Roofing Co. v. United States E.P.A., supra*, and reverse the District Court. Any other course of action would be inconsistent with the enforcement mechanism which Congress has established in the Clean Air Act and would unreasonably delay achieving the objectives of that Act.

---

ambient air quality. The result apparently required by this legislation in its present form could sacrifice the well-being of a large metropolitan area through the imposition of inflexible demands that may be technologically impossible to meet and indeed may no longer even be necessary to the attainment of the goal of clean air.

I believe that Congress, if fully aware of this Draconian possibility, would strike a different balance.

APPENDIX B

Amended Judgment of the United States Court of Appeals for the Eighth Circuit Entered as of February 20, 1979

United States Court of Appeals
For the Eighth Circuit

No. 78-1537 September Term, 1978

Union Electric Company, Appellee,

v.

Environmental Protection Agency, Appellant.

AMENDED JUDGMENT

APPEAL FROM the United States District Court for the Eastern District of Missouri.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed and that the complaint of Union Electric be dismissed.

February 20, 1979

APPENDIX C

Order of the United States Court of Appeals for the Eighth Circuit, Dated March 15, 1979, Denying the Petition for Rehearing

United States Court of Appeals
For the Eighth Circuit

78-1357 September Term, 1978

Union Electric Company, Appellee,

v.

Environmental Protection Agency, Appellant,

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

March 15, 1979

APPENDIX D

Section 113(a), (b) and (c) of the Clean Air Act, as Amended (42 U.S.C. Section 7413(a), (b) and (c))

(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (herafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of

section 7411(e) of this title (relating to new source performance standards), section 7412(c) of this title (relating to standards for hazardous emissions), or section 119(g) (relating to energy-related authorities) is in violation of any requirement of section 7414 of this title (relating to inspections, etc.), he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b) of this section.

(4) An order issued under this subsection (other than an order relating to a violation of section 7412 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith effort to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

(5) Whenever, on the basis of information available to him, the Administrator finds that a State is not acting in compliance with any requirement of the regulation referred to in section 129(a)(1) of the Clean Air Act Amendments of 1977 (relating to certain interpretative regulations) or any plan provisions required under section 7410(a)(2)(I) of this title and part D of this subchapter, he may issue an order prohibiting the construction or modification of any major stationary source in any area to which such provisions apply or he may bring a civil action under subsection (b)(5) of this section.

Violations by owners or operators of major stationary sources

(b) The Administrator shall, in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both, whenever such person—

(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or

(2) violates any requirements of an applicable implementation plan (A) during any period of Federally assumed enforcement, or

(B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section of a finding that such person is violating such requirements; or

(3) violates section 7411(e) of this title, section 7412(c) of this title, section 119(g) (as in effect before August 7, 1977), subsection (d)(5) of this section relating to coal conversion) section 7620 of this title (relating to cost of certain vapor recovery), section 7419 of this title (relating to smelter orders) or any regulation under part B of this subchapter (relating to ozone);

(4) fails or refuses to comply with any requirement of section 7414 of this title or subsection (d) of this section; or

(5) attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

The Administrator may commence a civil action for recovery of any noncompliance penalty under section 7420 of this title or for recovery of any nonpayment penalty for which any person

is liable under section 7420 of this title or for both. Any action under this subsection may be brought in the district court of the United States for the district in which the violation occurred or in which the defendant resides or has his principal place of business, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty and to collect any noncompliance penalty (and nonpayment penalty) owed under section 7420 of this title. In determining the amount of any civil penalty to be assessed under this subsection, the courts shall take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought in any case where the court finds that such action was unreasonable.

Penalties

(c)(1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order under section 7419 of this title or under subsection (a) or (d) of this section.

(C) violates section 7411(e) section 7412(c) of this title; or

(D) violates any requirement of section 119(g) (as in effect before August 7, 1977) subsection (b)(7) or (d)(5) of section 7420 of this title (relating to noncompliance penalties or any requirement of part B of this subchapter (relating to ozone).

shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter; shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment or not more than six months, or by both.

(3) For the purpose of this subsection, the term "person" includes, in addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer.